Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

Charles R. Evans,
Petitioner,

v.

Steve Yarbrough, Judge, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals, upon *de novo* review of Petitioner's 42 USC 1983 action, correctly dismiss Petitioner's appeal to stay his damages claim pursuant to the ***Rooker-Feldman*** doctrine where the Sixth Circuit Court explicitly affirmed that "*the District Court properly abstained*" Petitioner's claims for injunctive and declaratory relief finding the requisite federal subject matter jurisdiction pursuant to ***Younger*** abstention?

PARTIES TO THE PROCEEDINGS

Petitioner

Charles R. Evans

Respondents

Steve Yarbrough
Susan Brown
Anne Tsitouris
Joseph Pilat
Christina Klaeger
Eugene Battisti, Jr.
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Petitioner Charles R. Evans respectfully requests that this Supreme Court of the United States issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not recommended for full-text publication and is reproduced in Appendix A. The opinion and order for the District Court for the Southern District of Ohio is reproduced in Appendix C. The opinion for the District Court pursuant to Petitioner's request for reconsideration is reproduced in Appendix B.

JURISDICTION

The U. S. Supreme Court retains jurisdiction to review decisions of the lower federal courts under Title 28 of the United States Code.

FEDERAL JURISDICTIONAL & ABSTENTION PRINCIPLES INVOLVED

The principles of ***Younger*** abstention[1] require an independent federal question. A District Court cannot reach abstention unless it has determined that a federal question exists.

Where federal subject matter jurisdiction is determined, and wherein the Federal District Court made a finding {affirmed by the Sixth Circuit Court of Appeals} that federal jurisdiction did exist, a District

[1] *Younger v. Harris*, 401 U.S. 37 (1971).

Court must refrain from exercising its' jurisdiction where state proceedings are pending,[2] unless exceptional circumstances exist. ***Younger*** abstention requires federal courts to abstain from exercising their jurisdiction where: (1) state proceedings are pending; (2) those proceedings involve important state interests; and (3) the federal plaintiff will be afforded an adequate opportunity to raise his constitutional claims in those state proceedings.[3]

Abstention permits the District Court to decline from exercising jurisdiction of a federal claim pursuant to a pending state proceeding in the interests of comity and federalism and in deference to the state court.

Abstention does **not** permit the District Court to dismiss damage claims where those claims **cannot be redressed** in the pending state court proceedings. As a matter of law, the District Court has no discretion to dismiss, rather than to stay claims for monetary relief.[4]

The ***Rooker-Feldman*** doctrine[5] expresses the principle that "federal courts have only original subject matter, and not appellate, jurisdiction [and] ... may not entertain appellate review of [or a collateral attack on] a state court judgment." [Citation omitted.]

Rooker-Feldman asks: is the federal plaintiff seeking to set aside a state court judgment, *e.g.*, is the federal claim inextricably intertwined with the state court

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[2] See Appendix C-Opinion & Order @ pg. 6-7.

[3] See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982).

[4] See *Deakins v. Monaghan*, 484 U.S. 193 (1988); *Litteral v. Bach*, 869 F.2d 297 at 298 (6th Cir. 1989).

[5] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

judgment? Or does the federal plaintiff present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party?[6]

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[6] In the instant matter, Petitioner questions the Sixth Circuit Court's application of ***Rooker-Feldman*** where bifurcated orders of the state court are not *final* appealable orders. An interlocutory order is **not** a *final* state judgment until the final decree/final appealable order is journalized. As of the filing of Petitioner Evans' appeal to the Sixth Circuit Court, a *final* state court judgment has **not** been journalized.

Question: Did the Circuit Court, upon *de novo* review, properly apply the ***Rooker-Feldman*** doctrine?

The Circuit Court reviewed the District Court's decision to abstain under ***Younger*** pursuant to a pending state proceeding, and affirmed the decision finding that the District Court had subject matter jurisdiction, and therefore, had properly abstained.

Rooker-Feldman is a limitation on subject matter jurisdiction in federal courts. See *Blanton v. United States*, 94 F.3d 227,233-34(6th Cir. 1996). The doctrine requires for the court to determine if: (1) an independent federal question exists and/or (2) a general constitutional challenge was made **or** determine if the party is requesting *the impermissible appeal* of a ***final*** state judgment?

"Lower federal courts have no jurisdiction directly to review ***final*** **decisions** of a state or similar jurisdiction in judicial proceedings." *Feldman, id.* at 476. [Emphasis added.]

In the instant matter, the bifurcated interlocutory order journalized on June 19, 1996 initially deprived Petitioner Evans of his right to custody by statutory designation as a "noncustodial" parent.

On June 15, 1998, 2 years later, the trial court issued a permanent order based solely on the bifurcated issue of parental rights, but not on all matters in the divorce. This order, while permanent, is **not** a ***final*** appealable order until the final decree is journalized.

As of the filing of Petitioner's Brief of Appellant on May 24, 2000, four (4) years after the initial deprivation by the state court, the state domestic court had **not** issued a *final* decree of divorce; therefore there was **no** *final* state court judgment.

Question: Was ***Rooker-Feldman*** properly applied by the Sixth Circuit Court to determine if Petitioner is seeking an

If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.[7]

Rooker-Feldman also consists of a second independent component that asks whether a general challenge to the constitutionality of state law was raised.[8]

Where ***Younger*** abstention requires federal question subject matter in order for the District Court to abstain from federal jurisdiction; likewise, the ***Rooker-Feldman*** doctrine cannot be applied where federal subject matter jurisdiction has been determined and where the federal claim is an independent claim that is not inextricably intertwined with a state court judgment. {See *Catz v. Chalker*, 142 F.3d 279 (6th Cir.1998); *Keene Corp. v. Cass*, 908 F.2d 293, 296 (8th Cir. 1990)}.

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impermissible appeal of a *final* state court judgment, where there is **no** *final* appealable order?

It appears that one of the critical elements, a ***final*** state court judgment, has not been met.

Petitioner contends that ***Rooker-Feldman*** is an incorrect application of federal law; for ***Younger*** abstention is the proper application where state proceedings are ***pending***, absent exceptional circumstances, pursuant to the District Court's finding of subject matter jurisdiction.

[7] See *GASH Associates v. Village of Rosemont, Ill.*, 995 F.2d 726, 728 (7th Cir. 1993).

[8] See *Feldman, id.* at 462, where this Court held in its Findings of Law #2, "Accordingly, here the District Court has jurisdiction over the elements of respondents' complaints involving a general attack on the constitutionality of the District of Columbia Bar admission rule." See also, *Feldman, supra* at 487 and FN 18.

In his complaint, Petitioner Evans made a general challenge to the facial constitutionality of Ohio's statutory scheme. Further he claimed he was denied his underlying federal right to legal custody of his daughter; equal protection in the retention of physical custody where both parents are *similarly situated*; and autonomy in his parent-child relationship. He asserted that the deprivation occurs as a pattern and practice in Ohio courts without an oral predeprivation hearing; without a legislated entitlement to a postdeprivation hearing within the mandatory time required under rule; and where the federal legal custody right is permanently terminated without a finding of fact supported by *clear & convincing* evidence of parental unfitness.

Petitioner asserts in his complaint that *both* parents in a divorce are denied due process,[9] under any set of circumstances and in any Ohio court, where Ohio's statutory scheme is vague and discretion dispensing in nature and where facially-explicit minimum due process requirements do not exist or are in conflict with federal requirements.[10] [Counts I-IV of Petitioner's Complaint.]

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[9] "Catz's due process allegation does not implicate the merits of the divorce decree, only the procedures leading up to it. For him to seek federal relief on this score need not be 'predicated upon a conviction that the state court was wrong' on the merits. *Keene, supra* at 297. And as we pointed out, relief for Catz's due process claim would not consist of a conflicting judgment on the merits." *Catz, id.*, 142 F.3d 279 (6th Cir.1998)quoting *Keene Corp. v. Cass*, 908 F.2d 293, 296 (8th Cir. 1990).

[10] "Minimum [procedural] due process requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

In Ohio, the pattern and practice exists that one parent's federal right is enlarged (arbitrary award of custody) through the deprivation of the other parent's federal right (arbitrary denial of custody), without a finding of parental unfitness. Ohio's statutory scheme aborts the fundamental protections mandated by the U.S. Supreme Court by violating the supremacy of federal liberties (a parent's autonomous liberty right to custody) and substituting the state court's arbitrary judgment (the best interests of a child) without evidentiary findings of fact (proof of parental unfitness).

Findings of parental unfitness must be made ***before*** the state court can intervene on behalf of the best interests of a child. Without a finding of parental unfitness, the child's best interests are implicitly protected by {*both*} fit parents. Where the parents are fit, then the state court has no reason to impinge upon the autonomous federal custody right of *either* parent.

The Sixth Circuit Court affirmed ***Younger*** abstention. The District Court found that federal subject matter jurisdiction did obtain, therefore Petitioner met the independent claim requirement and general constitutional challenge components that preclude dismissal pursuant to ***Rooker-Feldman.***

The Sixth Circuit Court decision confirms that Petitioner asserted a federal question,

"*Evans claimed that: 1) the defendants denied him his privacy and liberty rights with respect to custody and equal companionship of his daughter;*"

" and that Petitioner Evans asserted a facial challenge to the constitutionality of state law,

"and 2) Ohio Civ R.Civ.P.53(E)(4)(c) and Ohio Rev. Code 3109.04 are unconstitutional."[11]

Petitioner's request to stay his damages claim should not be subject to dismissal under ***Rooker-Feldman***.

STATEMENT OF THE CASE

Petitioner Charles Evans' complaint, filed in Federal District Court in May 1999, requested relief from various defendants in a 42 U.S.C. 1983 action where Petitioner claimed deprivations of his liberty, property, and privacy rights pursuant to the Ninth Amendment, Fourteenth Amendment, and pursuant to the Supremacy Clause, Article IV of the U.S. Constitution under color of state law.

Petitioner claimed that all designated "noncustodial" parents privileges and immunities were infringed upon, due process denied, and a violation of equal protection occurred in the implication of their liberty right to custody. Further, he made a general challenge to the constitutionality of Ohio's statutory scheme asserting that the facial language of Ohio's law was discretion dispensing in nature and did not provide explicit federal due process requirements. Furthermore, Petitioner asserted federal question jurisdiction under 28 U.S.C. 1331.

The District Court agreed that federal question jurisdiction obtained here, but abstained pursuant to the principles of *Younger v. Harris*, 401 U.S. 37 (1971), dismissing the injunction request. Six months later,

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[11] See Appendix A-Order @ page 1.

pursuant to ***Younger***, the District Court dismissed Defendant-Appellees from suit and dismissed Petitioner's claims for monetary damages and declaratory relief.

Before dismissing the case, the District Court failed to provide notice of the Court's intent to dismiss one of the parties *sua sponte* pursuant to *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983).[12] Also, the District Court failed to address Petitioner's pending Motion for Leave to File an Amended Complaint pursuant to Federal Civil Rule 15 which states that "leave shall be freely given" and where such *sua sponte* dismissal is an abuse of discretion. [13]

Petitioner Evans appealed the District Court's decision to the Sixth Circuit Court of Appeals asserting three assignments of error.[14]

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[12] See Brief of Appellant, Charles R. Evans @ pages 9-12 filed May 24, 2000 with the Sixth Circuit.

[13] See *Foman v. Davis*, 371 U.S. 178 at 182 (1962). See also, Brief of Appellant, Charles R. Evans @ pages 17-21.

[14] **I.** The Federal Court Cannot Dismiss Damage Claims for Monetary Relief that Cannot be Redressed in State Proceedings {versus a Stay on Damage Claims} where the Dismissal of the Entire Case is Based Solely on ***Younger*** Abstention. {NOTE: Petitioner's *sua sponte* dismissal issues were incorporated under this 1st Assignment of Error.}

II. Where the Exception of Flagrant Unconstitutionality to ***Younger*** Abstention is Raised, the Federal Court must Construe the Merits of Ohio's Facial Due Process procedures pursuant to Ohio Civil Rule 75(N) and Ohio Revised Code 3109.04 in light of Federal law upon the Implication of a Parent's Substantive Liberty Right to Custody.

III. Where Federal Questions are Raised in A Pending State Proceeding, the Adequate Opportunity to Raise Constitutional Challenges pursuant to the Third Prong of ***Younger*** *Requires* More than the mere Opportunity to Raise Such Claims, but Requires *the Achievement* of a Certain Result at a Meaningful Time and in a Meaningful Way.

The Sixth Circuit Court affirmed that "*the District Court properly abstained*" Petitioner's declaratory and injunctive requests for relief. Upon *de novo* review, the Sixth Circuit Court asserted "*[t]o the extent Evans sought monetary damages, we affirm the district court's judgment for reasons other than those set forth by the district court.*"[15] [See Appendix A-Order @ page 3].

The Sixth Circuit Court then dismissed Petitioner's damage claims raising for the first time the dismissal of Petitioner's damage claims pursuant to the ***Rooker-Feldman*** doctrine.

The Sixth Circuit Court opined that Petitioner's damage claims were "*inextricably intertwined with the state court's decision*" and "*Evans is merely raising specific grievances regarding decisions of Ohio's domestic relations courts, his federal case is essentially an impermissible appeal of the state court judgment.*" [Appendix A @ page 3.] Assuming *arguendo* that the Court's opinion is correct, the Circuit Court cannot ignore Petitioner's general challenge to the constitutionality of Ohio's statutory scheme.

But, the Sixth Circuit Court's *de novo* reason, the *lack* of federal jurisdiction for Petitioner's damage claims, is inapposite of its earlier affirmation of ***Younger*** where the District Court determined that federal subject matter jurisdiction *did* exist. Accordingly, the ambiguity of subject matter jurisdiction is in direct conflict with precedent decisions of other U.S. Courts of Appeals.

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[15] Title 31 of the Ohio Revised Code does not provide damage relief for tort claims in a domestic relations matter.

The Sixth Circuit Court found that the injunctive claim {dismissed at the July 1999 hearing for preliminary injunction} and the declaratory relief claim {dismissed in December 1999, see Appendix C} were "*properly abstained*" where state proceedings were pending, therefore ***affirming*** the District Court's finding of federal subject matter jurisdiction. The Court, upon the new basis of ***Rooker-Feldman***, did not find subject matter jurisdiction for the damage claims {dismissed in December 1999}.

But, the Sixth Circuit Court previously said:

"*Evans claimed that: 1) the defendants denied him his privacy and liberty rights with respect to the custody and equal companionship of his daughter; and 2) Ohio R. Civ. P. 53(E)(4)(c)*[16] *and Ohio Rev. Code 3109.04 are unconstitutional.*"[17] {See Appendix A-Order @ pages 1-2.}

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[16] The District Court incorrectly asserted in its Opinion and Order [Appendix C @ p. 3] that Petitioner was challenging the constitutionality of Ohio Civil Rule 53(E)(4)(c). The Sixth Circuit's misstatement of Civil Rule 53(E)(4)(c) must stem from the District Court's opinion. Mr. Evans challenged Ohio Civil Rule 75(M) in his Complaint, not 53(E)(4)(c). He attempted to correct the District Court's mistake in his Motion for Reconsideration Pursuant to Federal Civil Rule 59(e) filed December 10, 1999. {Note: See Appendix C @ p.4 where District Court properly corrected above, *i.e.* 75(M). The Sixth Circuit Court did not {closely} read the District Court's opinion *or* the Motion for Reconsideration and missed the correction.}

[17] The District Court's determination that federal question jurisdiction was present permitted the Court to abstain from exercising jurisdiction. See *Huffman v. Pursue*, 420 U.S. 592 at 594 (1975), "This case requires that we decide whether our decision in *Younger v. Harris*, 401 U.S. 37 (1971), bars a federal district court from intervening in a state civil proceeding such as this, **when the proceeding is based on a state statute *believed* by the district court *to be unconstitutional*.** A

The Sixth Circuit Court's affirmation that the District Court "*properly abstained*" evidences that both an independent federal claim and a general facial constitutional challenge was properly presented, thereby meeting the jurisdictional components to defeat application of ***Rooker-Feldman***.

"Of course, the *Rooker-Feldman* doctrine differs from preclusion in certain critical ways. For example, preclusion defenses are generally affirmative and can be waived; ***Rooker-Feldman* is jurisdictional** and cannot." *Hachamovitch v. DeBuono*, 159 F.3d 687, 696 n. 2 (2d Cir. 1998). [Emphasis added.]

ORIGIN OF THE PROCEEDINGS

This matter originates from an Ohio domestic relations proceeding filed by Petitioner Evans in April 1996. The authority in *Barber v. Barber*, 21 How. 582, 16 L.Ed. 226 (1859), "makes clear that the Constitution does not exclude domestic relations cases from the

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similar issue was raised in *Gibson v. Berryhill*, 411 U.S. 564 (1973)..." [Emphasis added.]

Defendant-Respondents also did not dispute Petitioner's federal questions, *"The crux of Plaintiff's argument is that he believes his rights were violated because he has been deemed the non-custodial parent in his domestic relations case pursuant to R.C. 3109.04 (Motion, pg.3, Complaint @ 111,120)."* See Motion to Dismiss Franklin County Defendants filed June 30, 1999.

Petitioner's Complaint provided the District Court a detailed record of the state court proceedings pursuant to the origin of his federal questions and general challenge to the constitutionality of state law. See Petitioner's four (4) causes of action: **Count I**: Denial of Procedural Due Process; **Count II**: Denial of Substantive Due Process; **Count III**: Denial of Equal Protection; **Count IV**: Denial of Privacy, specifically address liberty and privacy rights deprived under color of Ohio law.

jurisdiction otherwise granted by statute to the federal courts." [18]

From July 1996 through July 1999 Petitioner questioned the deprivation of custody and the facial language of Ohio's statutory scheme. The state court repeatedly, and intentionally, ignored him. On August 2, 1999 {after the District Court abstained pursuant to oral hearing on July 16, 1999}, Mr. Evans exposed his federal claims by informing the state court in an explicit reservation[19] that he was exposing his federal claims only to comply with *Government & Civic Employees Organizing Comm, CIO v. Windsor*, 353 U.S. 364 (1957) and **not** for adjudication in the state court.

On August 13, 1999, the state court ordered briefing of the constitutional issues and set a hearing for October 4, 1999.[20] Petitioner's domestic counsel raised the independent federal claims and his general challenge to the constitutionality of Ohio's statutory scheme. The state court issued a decision on April 27, 2000. The opinion construed Ohio's statutory scheme constitutional, opining where Mr. Evans' parental rights were not permanently ***terminated*** and severed, then no due process violation occurred. Regardless of the state court's opinion, the unequivocal fact that the state court construed state law pursuant to federal law is further evidence of Petitioner's independent federal questions.[21]

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[18] Cited in *Ankenbrandt v. Richards*, 504 U.S. 689 (1994).

[19] Mr. Evans' express reservation was filed in the state court pursuant to *England v. Medical Examiners*, 375 U.S. 411 (1963). See also, *Feldman, id.* at 480 and FN 14.

[20] See Appendix C- *Dec. 2, 1999* Opinion & Order @ pg. 7.

[21] The Sixth Circuit Court failed to take into consideration the state court's explicit recognition of Petitioner's independent federal questions. This matter was raised in the Brief of

Contrary to the Sixth Circuit Court's opinion[22], *"To the extent that Evans claims that he did not receive procedural due process, his claim is meritless. The record is replete with examples of Evans receiving all the process due him, including notice, hearings, ..."*; the fact remains that his custody deprivation occurred without oral hearing,[23]and subsequently, the state court failed to provide a statutorily-entitled postdeprivation hearing.[24] Upon written request, the state court has a mandated duty to provide a postdeprivation oral hearing within 28 days.[25]

As was asserted in Appellant's Brief, Petitioner Evans' statutory postdeprivation hearing did not occur within the 28-day mandated time frame. Petitioner's motion was summarily dismissed in an entry nearly 2 years later on June 15, 1998. The state court did not address

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Appellant. The state court's immediate response to Petitioner's express reservation ***corroborates*** the District Court's finding of federal subject matter jurisdiction.

[22] See Appendix A-Order @ p. 4.

[23] Magistrate's Order on June 19, 1996 pursuant to Ohio Civil Rule 75(N)(1).

[24] Ohio Civil Rule 75(N)(2): "[t]he court shall grant the party so requesting an oral hearing within twenty-eight days to modify the temporary order."

[25] See Brief of Appellant Charles R. Evans @ pages 33-34 & footnote, citing ***Logan v. Zimmerman Brush Co.***, 455 U.S. 422 (1982), where the deprivation was caused by the state system itself. This Court made clear that a statutorily entitled postdeprivation hearing must be held within the time specified in the statute. The constitutional entitlement mandates the timeliness of the hearing. This Court concluded that a violation of substantive due process occurs where the trial court does not adhere, *for any reason*, to the statutory time mandate.

See also ***Vitek v. Jones***, 445 U.S. 480 at 491(1980) which conclusion was reiterated in ***Logan*** that where the entitlement arose from a state statute, the state legislature had the prerogative to define the procedures to be followed to protect that entitlement.

the motion and gave no explanation for denying the required hearing.[26]

The pattern and practice in Ohio courts provides that the "*temporary order*" becomes the default presumption. Where no postdeprivation hearing is held, the default presumption remains the bar to overcome pursuant to R.C. 3109.04 *rather* than where both parents begin the final custody hearing on equal footing under R.C. 3109.03.[27]

Where the state court retains total discretion, the default presumption {the initial deprivation of custody} remains undisturbed {custody right is subordinate} to the "best interests of the child". The state court reasons that the child's stability would be jeopardized by a change of the physical and emotional environment the child has grown accustomed to. Without an abuse of discretion, this arbitrary decision remains undisturbed on appeal.

The permanent deprivation of a "noncustodial" parents' liberty right is made without a finding of parental unsuitability. Where Petitioner Evans entered the bifurcated final custody hearing for the allocation of his visitation rights and determination of child support

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[26] While Ohio mandates a postdeprivation hearing upon written request pursuant to Civil Rule 75(N)(2), even this entitlement is not constitutionally-compliant with federal case precedent, for the fact remains that the implication of custody is a liberty, and *not* a property, deprivation. As such, a ***predeprivation*** oral hearing is required. See Brief of Appellant pages 31-34, and specifically, the annotated footnote. See also, *Goldberg v. Kelly*, 397 U.S. 254 at 260 (1970) and *Skinner v. Oklahoma,* 316 U.S. 535 (1941).

[27] Ohio Revised Code 3109.03 Equal parental rights of father and mother: "they shall stand on an equality as to the parental rights and responsibilities..."

previously designated as the "noncustodial" parent, he was no longer *similarly situated* to the designated "custodial" parent, therefore equal protection is no longer relevant. The court simply decided, within its full discretion under authority of state law, that the best interests of Hannah were to remain with the "custodial" parent and subsequently ordered Petitioner, now a permanently designated "noncustodial" parent, to state-entitled visitation and state-required responsibilities of child support. Federal custody was permanently deprived.

If this process was in actuality, "*all of the process due him*", as was so dramatically alluded to by the Sixth Circuit Court's recital, then the Court could not have {closely} read Petitioner's Brief or the record.

In Ohio, the pattern and practice is to bifurcate the various divorce issues with separate hearings pursuant to journalizing the divorce decree and separation agreement.

The Sixth Circuit Court made a sweeping and erroneous generalization that Evans received "*all the process due him*" merely because several hearings were held in the divorce matter regarding property settlement, income determination, attorney fee awards, etc., etc.

Where "*the record is replete with examples of Evans receiving all the process due him, including notice, hearings, the right to be present, the opportunity to have retained counsel ... and a decision in writing.*", does not evidence that Petitioner received "*all the process due him*" upon the implication of his federal right to custody.

The Sixth Circuit Court incorrectly inferred and concluded that the process due for hearings held several years apart and totally separate from the bifurcated custody deprivation, provided "*all the process due him*".

The deprivation of Petitioner's custody right occurred solely upon submission of affidavits to the clerk of courts and "without oral hearing". {Ohio Civil Rule 75(N)(1).} An arbitrary decision is made without examination of the facts. As is the pattern and practice in Ohio's domestic courts, one parent's custody right is immediately deprived without a finding, for there is **no** oral predeprivation hearing.

The fact remains that Ohio's statutory scheme lacks the explicit facial language to provide "*all the process due*" where a parent's autonomous federal liberty right to custody is implicated.

UNDERLYING CONSTITUTIONAL CHALLENGE & INDEPENDENT FEDERAL QUESTIONS PURSUANT TO THE FEDERAL JURISDICTIONAL & ABSTENTION PRINCIPLES INVOLVED

Petitioner Evans' underlying federal claims are explicitly pled in Petitioner's complaint [Counts I-IV]. Petitioner's due process claim (and other federal questions) does not implicate the merits of the state domestic court's decision. {See *Catz, id.*} The independent federal claims are *not* inextricably intertwined with the state court decision, for there is nothing that would prevent the state court from reaching the same custody determination under constitutional provisions.

Ohio's procedural rule affixing interlocutory custody {Civil Rule 75(M)(1) & (2)} and statute affixing permanent custody [R.C. 3109.04, various sections]:

(A) do not provide explicit minimum federal due process requirements;

(B) deny equal protection to one parent immediately upon statutory designation, where such designation implicates a federal liberty right; and

(C) impinge upon the privacy of an autonomous parent-child relationship.

There are **no** provisions for:

(1) an oral hearing pursuant to the procedural rule,[28] applicable to interlocutory custody orders where such interlocutory order becomes the default presumption, that sets legal and physical custody prior to the final order, for the designated "noncustodial" parent ;

(2) an explicit constitutionally compliant evidentiary standard, *i.e.* "*clear & convincing*" evidence of parental unfitness {pursuant to both the procedural rule[29] & statute[30]}; and

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[28] Ohio Civil Rule 75 (M)(1)[now(N)(1)] reads: "without oral hearing and for good cause shown".

[29] Ohio Civil Rule 75(N)(1) requires: "upon satisfactory proof by affidavit duly filed with the clerk of court, the court or referee".

[30] Ohio Revised Code 3109.04 Allocation of parental rights and responsibilities for care of children; shared parenting (throughout various sections of the statute) permits that: "the court, **in its *discretion*, may**"; "**may** select"; "**may** order"; "**may** cause"; "**may** designate"; "**may** reject"; "**may** approve"; "the

(3) a finding of fact of parental unfitness prior to the deprivation of interlocutory or permanent custody {pursuant to both the procedural rule & statute}.

Petitioner asserts that the State of Ohio denies equal protection of legal and physical custody upon statutory designation, which designation implicates a parent's right to custody. Such statutory designation requires constitutional scrutiny where the designation implicates a federal right.[31]

The application of Ohio's statutory scheme impinges upon a constitutional right, {a fit parent's liberty right to custody} by disadvantaging a designated group, {the designated "noncustodial" parent} where both parents were *similarly situated* parents **prior** to divorce, by temporarily suspending the custody right of one parent. And subsequently, the state court **permanently *terminates*** the "noncustodial" parents' federal right to *legal* custody, as well as denies equal protection of *physical* custody of their child upon journalization of the bifurcated order under color of state law.

Every parent, in every Ohio divorce with children, is subject to this statutory scheme. There is ***no remedy*** at law ***under any set of circumstances*** in ***any*** Ohio court, {and subsequently in *any* Ohio appellate court where the same statutory language is applied upon review}.

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approval of this plan...under division...or of this section **is *discretionary*** with the court"; "**may** commit"; "**may** modify"; "if it [the court] determines , upon its own motion"; and "**may *allocate* the parental rights and responsibilities**".

[31] See *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

Petitioner Evans made a general challenge to the constitutionality of Ohio law where the explicit language is patently violative of minimum due process requirements[32], e.g. "without oral hearing" and "upon satisfactory proof by affidavit" {CivR 75 (N)} and where the statutory scheme is void for vagueness[33] and discretion-dispensing in nature,[34] e.g. "*may* make an order for the *allocation of parental rights* [custody] of minor children." {R.C. 3109.04}.[35]

If Ohio law expressly provided constitutionally compliant federal due process requirements for an oral hearing[36] *before* the deprivation of legal custody *and* a

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[32] See Complaint of Charles R. Evans @ Counts I & II.

[33] See Brief of Appellant Charles R. Evans at pages 35-38. See also, *Grayned v. City of Rockford*, 408 U.S. 104 at 108 (1972).

[34] See *Alsager v. Dist. Court of Polk Cty., Iowa*, 406 F.Supp.10 at 15, fn 2;18-21 (Iowa 1975).

[35] See Petitioner's 92-page Brief of Plaintiff For Jurisdiction & Merits filed June 28, 1999 pursuant to the District Court's order to brief the federal questions prior to oral hearing for preliminary injunction held on July 16, 1999 before Hon. Algenon Marbley supporting Petitioner Evans' federal claims and facial challenges to Ohio's statutory scheme. See also, Brief of Appellant Charles R. Evans filed in the Sixth Circuit.

[36] Ohio Civil Rule of Procedure 75 (N)(1) permits interlocutory custody determination *without* an oral hearing and *without* a finding of parental unfitness.

Ohio CivR 75(N)(1) reads: "upon satisfactory proof by affidavit duly filed with the clerk of court, the court or referee, without oral hearing and for good cause shown, ...[the court] may make a temporary order regarding the support, maintenance, and allocation of parental rights and responsibilities for the care of the children of the marriage..."

R.C. 3109.04 contains **no** provision requiring proof of parental unfitness before permanent deprivation of the designated "noncustodial" parent's custody right. A previously *similarly situated* parent {autonomously *equal* during the marriage} is now designated by court order as the "noncustodial" parent. The order permanently terminates *legal* custody.

finding of fact of parental unfitness by "*clear & convincing*" evidence,[37] then the same result, *i.e.*, a finding of parental unfitness and the termination of parental rights,[38] could be constitutionally achieved by Ohio's domestic courts.

As a matter of law, the Sixth Circuit Court found in *Hooks v. Hooks* that ***any*** deprivation of a parent's ***custody*** interest {*legal* ***or*** *physical*} must be accomplished by procedures meeting due process. It is important to note that the *Hooks* Court finding does **not** require the total termination of all parental rights, but the *Hooks* Court unequivocally found that the parent's liberty interest is violated where ***any*** deprivation of custody occurs without meeting the minimum requirements of due process.[39]

Ohio law does **not** provide parents with a "presumption of legal custody and equal physical custody" in divorce with children.

[37] See *Santosky v. Kramer*, 455 U.S. 749 (1982); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); 573 *Stanley v. Illinois*, 405 U.S. 645 (1972).

[38] "Parents have **a liberty *interest in custody*** of their children and, therefore, ***any*** **deprivation of that *interest*** by the state **must be accomplished by procedures meeting the requirements of due process.**" *Hooks v. Hooks*, 771 F.2d 935 findings of law #1 (6th Cir. 1985). [Emphasis added.]

[39] The Franklin County Appellees assert that Petitioner Evans' parental rights were not terminated, therefore a civil rights violation was not properly alleged. The Appellees assert that the federal violations alleged, *i.e.*, the permanent deprivation of Petitioner's right to legal custody of his daughter, does not reach a constitutional violation because the deprivation did not entail "the ***total destruction*** of the parent-child relationship." See Brief of Appellees Judge Steve Yarbrough, Judge Susan Brown, Magistrate Tsitouris, Joseph Pilat @ pages 14-15, filed July 5, 2000 in the Sixth Circuit.

See also, *Hooks, id.* and *Franz v. United States*, 707 F.2d 582 (1983) where substantive parental rights were not totally

Where there is no finding of fact made to determine parental unsuitability,[40] there is no cause for the state court to intervene and award custody to one parent by depriving the *other* parent of *their* autonomous liberty right to custody of their child. Autonomy of the parent-child relationship rests within the privacy right of the individual parent, not the married couple.

Where there is no finding of fact of parental unfitness, then the best interests of the child is implicitly protected. A parent's superior federal right to custody cannot be implicated without a finding of parental unsuitability, for the best interest of their child is not in jeopardy where both parents are fit[41].

Further, no evidentiary standard exists on the face of Ohio law that meets federal requirements permitting the State of Ohio to deprive one parent of their temporary, and subsequently, of their permanent right to

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destroyed, but were denied under color of law. The *Franz* Court found that the denial and deprivation of a parent's *visitation* [temporary physical custody] *right* constituted a liberty right violation.

[40] Unsuitability {unfit, unwilling, & unable} encompasses more than a determination of parental unfitness. Unwillingness, or an inability to parent, are relevant factors for state intervention.

[41] The patterned argument raised by Ohio's courts assert that parental conflict is not in the best interests of a child, and therefore parental conflict is a rational basis for the state's arbitrary intervention and implication of one parent's custody right. However, the state courts fail to recognize that the implication of a federal liberty right requires the highest level of *constitutional* scrutiny, for the state's *rational* theory of conflict (a common denominator in custody divorce) totally ignores the superiority of each parent's autonomous federal custody right. No constitutional basis exists to deny a federal right where both parents are suitable. {See U.S. Constitution, Article IV}

autonomous legal custody and an equality of physical custody of their child. [42]

The Sixth Circuit Court adds to this confusion [see Appendix A-Order @ page 2]: *"He {Evans} concedes that his parental rights have not been terminated, but disagrees with the manner in which his parental or visitation rights were allocated."*[43]

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[42] The constant confusion regarding definitions of custody; parental rights; permanent versus temporary custody; joint custody; shared parenting; visitation; residential and nonresidential parents; temporary physical custody; termination of parental rights; legal custody; and physical custody, are the source of many problems and corresponding decisions by the state and federal courts. This misuse of language provides the lower state courts the ability to skirt merit issues due to the ambiguity of the terms.

A recent Ohio Supreme Court decision clearly defined **custody, *legal and physical***:

> "Child visitation" and "child custody" are related but distinct legal concepts: "custody" resides in the party or parties who have the right to ultimate **legal and physical control of a child**, while "visitation" resides in a noncustodial party and encompasses that party's right to visit a child." ***Braatz v. Braatz,*** 85 Ohio St. 3d 40 (Ohio 1999).
>
> "Although a party exercising visitation rights might gain temporary physical control over the child for that purpose, such control does not constitute "child custody" because the legal authority to make fundamental decisions about the child's welfare remains with the custodial party..." ***Id.***

[43] In his Complaint, Petitioner asserts that his *legal* right to custody was deprived without due process; for such liberty right is terminated upon permanent designation as a "noncustodial" parent, pursuant to the final bifurcated order of June 15, 1998. {NOTE: The bifurcated order, even though **not** a final *appealable* order until the final decree is journalized, must be adhered to, for the authority of the state court rests with the *in personam* jurisdiction of the parties and the "best interests" of the child, until the child reaches the age of majority. Failure to abide by this interlocutory order subjects a party to show cause

Ohio courts routinely violate the supremacy of a parent's federal right to custody of their child by denying one parent of their individual autonomy of legal custody and an equal division of physical custody of their child where the *best interests* of the child are implicitly protected, *e.g.* no finding of parental unfitness. The explicit language of Ohio's statutory scheme permits the

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for contempt. The binding court authority is permanent wherein the order results in termination of legal custody, even though the order is not a final appealable state court judgment.}

Mr. Evans did assert that he retains state-entitled "visitation" {temporary physical custody of daughter Hannah Evans (age 6) for the time specified in the bifurcated order}, but that the amount of time is **not** equally protected upon his designation as a "noncustodial" parent.

Once a parent's federal right to legal custody is terminated, the now designated "noncustodial" parent is no longer equally protected (for he is no longer *similarly situated*) to the "custodial" parent. The "custodial" parent enlarges her federal right, obtaining 100% of the legal-decision-making rights.

Therefore, Petitioner's legal custody right has been terminated without a finding of parental unfitness where he is now designated, by court order, as the "noncustodial" parent. Petitioner's state-entitled visitation {temporary physical custody} is not subject to equal protection under the 14th Amendment because both parents are no longer *similarly situated.* {Note: Both parents were *similarly situated* during their marriage.}

Petitioner Evans did ***not*** concede that his parental rights were not terminated, nor that he ***only*** disagrees with the manner in which his parental or visitation rights were allocated. The record does not support this erroneous contention. [See Appendix A-Order @ page 2].

The Complaint asserts that Petitioner's right to legal custody was implicated upon his statutory designation as a "noncustodial parent" *and* that he was deprived of equal protection of physical custody of his daughter since he was no longer *similarly situated*, and where such deprivation occurred without due process under color of state law.

See also, *Donald C. Hubin,* ***Parental Rights and Due Process***, Journal of Law & Family Studies, University of Utah College of Law, Vol.1, No.2, 123-150.

state court *total* discretion to deprive one parent of their federal liberty right to custody.

Petitioner can demonstrate that Ohio law is patently violative of required federal due process procedures. Abstention has precluded Petitioner from reaching his merit argument. The patent failure of Ohio's explicit statutory language to provide minimum due process requirements unequivocally substantiates Petitioner's independent federal claims and general challenge to the facial constitutionality of Ohio law.

In his Brief and Motion for Reconsideration to the District Court, and pursuant to his second Assignment of Error to the Circuit Court, Petitioner raised the issue that an exception to ***Younger*** existed, but the lower federal court opted out of a merit determination of the exception raised.

Because Petitioner's federal claims are independent from the state court's bifurcated decision, Petitioner Evans' federal claim **cannot**, by definition, be ***intertwined.***[44] Second, the District Court has subject matter jurisdiction over Petitioner's general challenge to the constitutionality of Ohio's law.[45] Both District and Sixth Circuit Courts ignored this component of ***Rooker-Feldman.***

Pursuant to the Sixth Circuit Court's affirmation that "*the district court properly abstained*", a federal claim does in fact exist; and where such federal claim does exist, the presence of an independent federal claim renders ***Rooker-Feldman*** inapplicable in this matter.

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[44] See *Catz, id.* 142 F.3d 279 (6th Cir.1998).
[45] See *Feldman, id.* at 487 and FN 18.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Is Ambiguous And Erroneous

The underlying issue: Does a federal claim exist?

Yes, the District Court made a finding that a federal claim did exist. Abstention cannot be reached without federal question jurisdiction present. The state court, *albeit* only upon express reservation, also made a determination that a federal question and general challenge was made requiring it to construe state law pursuant to federal law. And, the Sixth Circuit Court explicitly affirmed the District Court's finding:

"Upon review, we conclude that to the extent that Evans sought injunctive and declaratory relief, the district court properly abstained." {*Citations omitted.*} [See Appendix A @ page 2.]

Upon *de novo* review, the Sixth Circuit Court raised the following question {where Petitioner Evans asserted that the District Court should not dismiss his damage claims}:

Does an *independent* federal claim exist upon *de novo* review of Petitioner's request to stay his damages claim?

The Sixth Circuit Court then stated that a federal claim did *not* exist and *"affirm[ed] the district court's judgment for reasons other than those set forth by the district court."* [See Appendix A @ page 3, 1st paragraph.]

But, the Sixth Circuit Court's decision is ambiguous and not logical.

While the Sixth Circuit Court retains the authority for *de novo* review of matters dismissed pursuant to abstention, the Court cannot state, on the one hand, that jurisdiction, *i.e.*, an independent federal question did exist where the District Court "*properly abstained*" Petitioner's injunctive and declaratory claims. And then on the other hand, decide that his damage claims could not be remedied under federal law by asserting that federal subject matter did **not** exist.

Federal subject matter jurisdiction should exist for either *all* of Petitioner's claims or *none* of his claims. Federal jurisdiction should be applicable to Petitioner's damage claims, therefore requiring the District Court to stay the damage claims until conclusion of the state court proceedings.

The Sixth Circuit Court stated: "*If the requirements for Younger abstention are met, a district court should stay, not dismiss, the 1983 action for damages pending resolution of the state proceeding.*"[46] Thus the Court affirmed [47] Petitioner Evans' first Issue Presented For Review: The Federal Court Cannot Dismiss Damage Claims for Monetary Relief that Cannot be Redressed in State Proceedings {versus a Stay on Damage Claims} Where the Dismissal of the

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[46] The Sixth Circuit cited *Carroll v.City of Mount Clemens*, 139 F.3d 1072, 1075-76 (6th Cir. 1998); *Simpson v. Rowan*, 73 F.3d 134, 138-9 (7th Cir. 1995); *Williams v. Hepting*, 844 F.2d 138, 144 (3d Cir. 1988).

[47] See Appendix A-Order @ page 2, "The *Younger* abstention applies in this case because each of the foregoing factors is present."

Entire Case is Based Solely on Younger Abstention. {See Brief of Appellant Charles R. Evans @ page 9.}

As a matter of law, the Sixth Circuit Court cannot deny Petitioner's stay of his claim for damages.

The federal questions raised are important and affect 50,000 divorces filed in Ohio every year. This figure involves 49,000 children of divorce in Ohio every year. [48] The proper legal resolution of custody divorce affects a child's autonomous stability with each parent in his or her one-on-one relationship.

A "presumption of legal custody and equal physical custody of a child" would provide emotional and physical stability of familial structure, would significantly reduce protracted and unresolved custody disputes, and would protect parents and children unfairly subject to unconstitutional practices under color of state law. The right of parents to raise their children has been deemed basic and essential by precedent U. S. Supreme Court interpretation, but a general constitutional challenge to Ohio's statutory scheme has not been raised before.[49]

"Permanent termination of parental rights has been described as the " 'family law equivalent of the death penalty in a criminal case.' *** Therefore, parents 'must

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[48] Source is the Ohio Department of Jobs and Family Services.

[49] See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Parham v. J.R.*, 442 U.S. 584 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Washington v. Glucksberg*, 521 U.S. 702(1997); *Troxel v. Granville*, 530 U.S. ___ (June 5, 2000). This long line of cases support a parent's federal liberty right to custody of their child where such protected right cannot be infringed upon by the state without minimum federal due process requirements being met.

be afforded every procedural and substantive protection the law allows.'" (Citations omitted.) *In re Hayes* (1997), 79 Ohio St. 3d 46 at 48.

Petitioner's question presented is important, and should be decided in a way that does not conflict with relevant decisions of this Court. The Sixth Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings in defining ***jurisdiction***; the power of a court to inquire into facts, apply the law, make decisions, and declare judgment.

Prudent judicial conduct requires this Supreme Court to clarify the ambiguity of the Sixth Circuit Court's decision and further clarify United States Court of Appeals precedent jurisdictional principles pursuant to the ***Rooker-Feldman*** doctrine.

II. The Decision Of The Sixth Circuit Court of Appeals Is Inconsistent With Jurisdictional Principles Established By Other Circuit Courts

Jurisdictional determinations are reviewed *de novo.*[50] In an analogous jurisdiction matter, the Sixth Circuit Court stated, "The bankruptcy court's factual findings that are the basis of a jurisdictional determination will not be disturbed unless clearly erroneous."

Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320 at 326 (6th Cir. 1990).

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[50] See *Greater Detroit Resource Recovery Auth., v. EPA*, 916 F.2d 317 (6th Cir. 1990).

If this holding is, in fact, the precedent principle established by the Sixth Circuit Court; then the District Court's finding of federal subject matter jurisdiction in the instant matter and the Sixth Circuit Court's affirmation of that finding, "are the basis of a jurisdictional determination" that should not be disturbed "unless clearly erroneous".

"*[U]pon review, we conclude that to the extent that Evans sought injunctive and declaratory relief, the district court* ***properly*** *abstained.*" [See Order-Appendix A @ page 2.] The District Court was ***not*** "clearly erroneous" determining federal subject matter jurisdiction pursuant to ***Younger***.[51]

But, the Sixth Circuit Court's ambiguous conclusion that federal jurisdiction was proper for declaratory and injunctive relief and not available for damage claims must be clarified, for no precedent can be found in any U.S. Court of Appeals.[52] The decision of

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[51] "[F]ederal courts have a continuing obligation to inquire into the basis of subject-matter jurisdiction to satisfy themselves that jurisdiction to entertain an action exists." *Campanella v. Commerce Exch. Bank*, 137 F.3d 885 at 890 (6th Cir. 1998). "This responsibility extends to inquiry into the jurisdiction of the trial court." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 at 541 (1986). The Sixth Circuit Court did inquire into the jurisdiction of the trial court, and affirmed the District Court's decision to abstain. "This duty applies irrespective of the parties' failure to raise a jurisdictional challenge on their own, and if jurisdiction is lacking, dismissal is mandatory." *Campanella, supra* at 890. Respondent-Appellees failed to raise this jurisdictional issue. The Sixth Circuit Court, consistent with this duty, *sua sponte* reviewed whether the ***Rooker-Feldman*** doctrine barred litigation of this action.

[52] See **Second** Circuit decision in *Hachamovitch, id.* and the **Seventh** Circuit decision in *GASH Assoc., id.* See also, *Andrew M. Apfelberg,* ***Rooker-Feldman****: The New "Abstention" Doctrine for Practitioners in the* ***Ninth*** *Circuit,* Am Bankr. Ist.

the Sixth Circuit Court is inconsistent with jurisdictional principles established by other Circuit Courts. Further there was no final state court judgment. Therefore ***Rooker-Feldman*** is the incorrect application of federal law pursuant to a pending state proceeding where federal jurisdiction was established pursuant to ***Younger***. Petitioner's damage claims should have been stayed.

Rooker-Feldman does not obtain here.

CONCLUSION

The Sixth Circuit Court's plain error is so prejudicial, that if uncorrected, it would have a material adverse affect on the character of, and public confidence in, the judicial system.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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J.1, 28 (Apr. 1998) defining concepts of *res judicata* and *collateral estoppel* founded on the Full Faith and Credit statute, 28 U.S.C. 1738, as opposed to ***Rooker-Feldman,*** which is based upon 28 U.S.C. 1257 and the separate principal that only the U.S. Supreme Court has appellate jurisdiction over a state's civil court judgments.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 13, 2000]

No. 00-3588

CHARLES R. EVANS,
Plaintiff-Appellant

v.

STEVE YARBROUGH, Judge, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District
of Ohio Eastern Division.
No. C2-99-516 Algenon L. Marbley,
District Judge.

Before: MARTIN, Chief Judge; GUY and COLE, Circuit Judges.

ORDER

[-1-]

This pro se Ohio litigant appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel

unanimously agrees that oral argument is not needed. Fed. R. App P. 34(a).

Seeking monetary damages, injunctive relief, and a declaratory judgment, Charles R. Evans sued three judicial officers of the Franklin County (Ohio) court of Common Pleas (Judge Steve Yarbrough, Judge Susan Brown, and Magistrate Ann Tsitouris), the Director of the Franklin County Child Support Enforcement Agency (Joseph Pilat), his former spouse (Christina Klaeger Evans), his former spouse's attorney (Eugene Battisti, Jr., and the court-appointed guardian ad litem for the couple's minor child (Lora Cleary). If read liberally, Evans' complaint seeks monetary damages from the defendants in their individual and official capacities. In essence, Evans claimed that: 1) the defendants denied him his privacy and liberty rights with respect to the custody

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and equal companionship of his daughter; and 2) Ohio R. Civ. P. 53(E)(4)(c) and Ohio Rev. Code 3109.04 are unconstitutional.

The district court abstained under the principles enunciated in *Younger v. Harris*, 401 U. S. 37 (1971), and granted the defendants' motion to dismiss. Evans appeals that judgment. In his timely appeal, Evans reasserts the arguments he set forth in the district court.

This court reviews de novo a district court's decision to abstain under *Younger*. See *Mann v. Conlin*, 22 F.3d 100,101 (6th Cir. 1994); *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962,967 (6th Cir. 1991).

Upon review, we conclude that to the extent that Evans sought injunctive and declaratory relief, the district court properly abstained. See *Trainor v. Hernandez*, 431 U.S. 434,444 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592,604 (1975); *Samuels v. Mackell*, 401 U.S. 66,72 (1971). Evans contends that the defendants

violated his constitutional rights by designating him as the non-custodial parent in a state court custody case. He concedes that his parental rights have not been terminated, but disagrees with the manner in which his parental or visitation rights were allocated. The *Younger* abstention applies when a state proceeding (1) is currently pending, (2) involves an important state interest, and (3) affords the plaintiff an adequate opportunity to raise constitutional claims. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423,432 (1982); *Kelm v. Hyatt*, 44 F.3d415, 419 (6th Cir. 1995); *Nilsson v. Ruppert, Bronson & Chicarelli Co.*, 888 F.2d 452,454 (6th Cir. 1989).

The *Younger* abstention applies in this case because each of the foregoing factors is present. It is clear from the record that the state actions concerning the same or similar issues were pending when Evans filed his federal complaint. Further, a domestic relations question involves an important state interest under the second element of *Younger*. *See Kelm*, 44 F.3d at 420. This court must also presume that the state courts are able to protect the interest of the federal plaintiff unless he can prove the inadequacy of the state courts. *See id.* Evans has not demonstrated the inadequacy of the Ohio courts to protect his interests. Evans is merely displeased with the state courts' judgments adverse to his interests.

[-3-]

To the extent Evans sought monetary damages, we affirm the district court's judgment for reasons other than those set forth by the district court. *See City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251 (6th Cir. 1994). If the requirements for *Younger* abstention are met, a district court should stay, not dismiss, the 1983 action for damages pending resolution of the state proceeding. *See Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1075-76 (6th Cir. 1998); *Simpson v.*

Rowan, 73 F.3d 134, 138-9 (7th Cir. 1995); *Williams v. Hepting*, 844 F.2d 138, 144 (3d Cir. 1988).

Nonetheless, we affirm the district court's judgment for the following reasons. Under the *Rooker-Feldman* doctrine, federal courts lack jurisdiction to review a case litigated and decided in state court as only the United States Supreme Court has jurisdiction to correct state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 506-07 (6th Cir. 2000). Federal courts also lack jurisdiction to review constitutional claims that are inextricably intertwined with the state court's decision. *See Feldman*, 460 U.S. at 486-87; *Patmon*, 224 F.3d at 509-10. A plaintiff's claims are inextricably intertwined with the state court's decision if the federal claims can succeed only to the extent that the state court wrongly decided the issues before it, *see Catz. v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998), and if the federal claims assert specific challenges to the state court proceedings, rather than a general challenge to the constitutionality of the state law. *See Patmon*, 224 F.3d at 509-10; *Catz*, 142 F.3d at 293. A fair reading of the complaint reveals that Evans merely disagrees with the manner in which his parental or visitation rights were allocated. Since Evans is merely raising specific grievances regarding decisions of Ohio's domestic relations courts, his federal case is essentially an impermissible appeal of the state court judgment.

Finally, Evans challenges the constitutionality of Ohio R. Civ. P. 53(E)(4)(c) and Ohio Rev. Code 3109.04. His challenges are meritless. Rule 53(E)(4)(c) provides that the court may adopt a magistrate's decision and enter judgment without waiting for timely objections by the parties. Ohio Rev. Code

3109.04 provides the standards by which Ohio courts determine parental rights,

[-4-]

custody modifications, and the best interests of the child. The rule is not unconstitutional as it addresses a matter of procedure and does not deprive a party of its right to be heard on appeal. *Cf. Salehpour v. University of Tenn.*, 159 F.3d 199, 203 (6th Cir. 1998) (decision to grant summary judgment sua sponte and without notice is reviewed for abuse of discretion.) The statue is not unconstitutional on its face because it clearly possess a rational nexus to the state government's important interests in seeking to secure the safety of its minor citizens, *see Curto v. Harper Woods*, 954 F.2d 1237, 1243 (6th Cir. 1992); and the court does not consider Evans' "unconstitutional as applied" challenge because federal courts lack subject matter jurisdiction over constitutional challenges is inextricably intertwined with state judicial proceedings. *See Feldman*, 460 U.S. at 486-87; *Patmon*, 224 F.3d at 509-10.

To the extent that Evans claims that he did not receive procedural due process, his claim is meritless. The record is replete with examples of Evans receiving all the process due him, including notice, hearings, the right to be present, the opportunity to have retained counsel, neutral and detached judicial officers, a report by the court-appointed guardian ad litem regarding the child's best interests, and a decision in writing. *See Doe v. Staples*, 706 F.2d 985, 990-91 (6th Cir. 1983).

Accordingly, the district court's judgment is hereby affirmed pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed April 17, 2000]

Case No. C2-99-516

CHARLES R. EVANS, et al.,
Plaintiffs

v.

JUDGE STEVE YARBROUGH, ET AL.,
Defendants.

[-1-]

ORDER

This matter comes before the Court on Plaintiff Charles R. Evans' Motion for Reconsideration of Abstention Pursuant to Federal Civil Rule 59(e) and Request for Oral Hearing on the Merits. Plaintiff asks this Court to reconsider its December 2, 1999 Order granting Defendants' Motion to Dismiss on the grounds that it lacked jurisdiction under the *Younger* abstention doctrine. For the reasons set forth below, the Court hereby **DENIES** Plaintiff's Motion for Reconsideration of Abstention Pursuant to Federal Civil Rule 59(e) and Request for Oral Hearing on the Merits.

I. Introduction[1]

This case derives from a domestic relations action in which Plaintiff has been involved for approximately four years. Pursuant to Federal Rule of Civil Procedure 59(e), Plaintiff implores the Court to alter or amend its judgment to abstain from the instant case, citing primarily three reasons. First, Plaintiff argues that the third prong of the *Younger* test is not satisfied because the Ohio state courts are inadequate to address his constitutional claims.

[-2-]

Second, Plaintiff contends that the Court continues to have jurisdiction in light of the exceptions to the *Younger* doctrine, namely that the relevant state statutes are unconstitutional. Third, Plaintiff argues that his claims for monetary damages under 42 U.S.C. 1983 bar dismissal.

II. Analysis

As a general principle, motions for reconsideration are looked upon with disfavor unless the moving party demonstrates: (1) a manifest error of law; (2) newly discovered evidence which was not available previously to the parties; or (3) an intervening change in controlling law. *Gencorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). It is the first of these grounds upon which Plaintiff Evans apparently relies in filing the present motion. Thus, reconsideration will be appropriate if necessary to correct a clear error of law upon which the Court based its dismissal judgment.

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[1] For a recitation of the attendant facts, see the Court's Order filed December 2, 1999.

Plaintiff's arguments regarding the *Younger* doctrine amount to little more than disagreement with the Court's decision. Plaintiff attempts to restate arguments he has already presented to the Court with additional assertions about the "flagrant" and "patent" unconstitutionality of the challenged state statutes. Plaintiff's latest round of arguments are more appropriately reserved for appellate review. As one court stated, mere dissatisfaction with a court's ruling is an inappropriate and insufficient ground to support a motion for reconsideration:

> As the above standards indicate,...these motions should not be filed as a matter of routine by the party who has been adversely impacted by a court's ruling. This Court, just like all other courts, works diligently and strives carefully to issue its best opinion while deciding any motion. Unless the parties can convince this Court that the standards described above have not been met (i.e., to correct "manifest errors of law or to present newly discovered evidence"), this Court strongly believes that the parties' energies can be better served by pursuing their
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> reargument at the proper time on appeal. Filing a motion to reconsider should not be a 'Pavlovian Response' to an adverse ruling."

Jefferson v. Security Pac. Fin. Servs.; Inc., 162 F.R.D. 123, 125 (N.D. Ill. 1995).

Having said that, the Court finds the Plaintiff's arguments unpersuasive. At the time that the Court ruled on Defendants' Motion to Dismiss it considered both of the issues raised by Plaintiff regarding application of the *Younger* doctrine. In deciding to abstain, this Court found that the three-part test of the *Younger* doctrine was satisfied because, in relevant part, Plaintiff is, and has been, provided an adequate opportunity to present his constitutional challenges in Ohio state courts.[2]

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[2] The Court's December 2, 1999, Order noted that Plaintiff has filed, in various Ohio state courts, three separate cases raising the same constitutional claim. Currently, the Franklin County

In the present motion, Plaintiff contends that the state courts are wholly inadequate because they have yet to render a decision on his constitutional claims. Plaintiff further argues that the state courts' silence demonstrates an unwillingness to address his constitutional claims. Plaintiff's argument is premised on his belief that the adequacy of opportunity to raise a claim under the third prong of *Younger* is measured by whether a state court is willing to address a party's constitutional challenge in a timely fashion.

Where there is a challenge to a state statutory scheme, then policies of comity and federalism counsel in favor of abstention so that the state has an opportunity to interpret its rules in the face of a constitutional challenge. *Fieger v. Thomas*, 74 F.3d 740, 745 (6th Cir. 1996). Accordingly, the adequate opportunity requirement under *Younger* is met unless state law clearly

bars the presentation of the constitutional claims. *Id.* at 745-46 (citing *Moore v. Sims*, 442 U.S. 415, 425-26 (1979)); see also *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982). The burden is on the plaintiff to show that state law bars the interposition of its claim. *Id.* In this case, Ohio state law does not bar Plaintiff's constitutional claims. In fact, Plaintiff had, and continues to have, the opportunity to raise his constitutional issues in a state court proceeding. Plaintiff has failed to prove that Ohio state law prohibits him from presenting his constitutional claims. Plaintiff's

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Court of Domestic Relations, Case No. 96DR-04-1865, is considering essentially the same constitutional claims Plaintiff has presented to this Court. Plaintiff clearly has and continues to have an opportunity to raise his constitutional claims in a pending state action. This fact, combined with the state's compelling interest in regulating family rights, requires abstention by this Court.

argument that the Ohio state courts are unwilling to address his constitutional challenges finds no support in the record in this case.

Plaintiff also argues that his case falls within an exception to the Younger doctrine. Although the issue was not expressly mentioned in the Court's December 2, 1999 Order,[3] the *Younger* exceptions clearly do not apply to Plaintiff's case.[4] Plaintiff relies upon the flagrant unconstitutionality exception to abstention which provides that if a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it," federal intervention is necessary, even in the absence of bad faith or harassment. *Fieger*, 74 F.3d at 750 (quoting *Younger v. Harris*, 401 U.S. 37, 53-54 (1971)). Plaintiff's argument that the Ohio state statutes he challenges are flagrantly unconstitutional, warranting exception to *Younger*

[-5-]

abstention, must fail. The law is clear that even "the possible unconstitutionality of a statute on its face does not in itself justify [federal intervention] against good-faith attempts to enforce it, especially absent any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Id.(quoting Younger*

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[3] In rendering its decision to dismiss, the Court relied on the U.S. Supreme Court's application of the *Younger* doctrine in *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982). In *Middlesex*, the *Younger* exceptions were addressed. The Court's reliance on *Middlesex* lays inference to its consideration of whether the exceptions were applicable to Plaintiff's case.

[4] The generally accepted exceptions that proscribe Younger abstention are bad faith, harassment, or flagrant unconstitutionality. See *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996).

v. Harris, 407 U.S. 37, 54 (1971)). The Court in *Younger* found that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger v. Harris*, 401 U.S. 37,51 (1971). This Court finds that Plaintiff's claim challenging Ohio statutes as unconstitutional on their face does not satisfy the flagrant unconstitutionality exception under the *Younger* doctrine.

Finally, Plaintiff presents two arguments against dismissal based on his claim for monetary damages. These issues were not raised by Plaintiff in response to the Defendants' Motions to Dismiss and therefore, were not taken into consideration by the Court in arriving at its decision. A motion under Federal Rule of Civil Procedure 59(e) is for reconsideration, not initial consideration, and does not afford a party the opportunity to re-argue its case. *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (citing *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992)).

III. Conclusion

For the foregoing reasons, the Court hereby **DENIES** Plaintiff Evans' Motion for Reconsideration of Abstention Pursuant to Federal Civil Rule 59(e) and Request for Oral Hearing on the Merits.

IT IS SO ORDERED.

/s/ **ALGENON L. MARBLEY**
UNITED STATES DISTRICT JUDGE

Dated: April 14, 2000

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed December 2, 1999]

Case No. C2-99-516

CHARLES R. EVANS, et al.,
Plaintiffs

v.

JUDGE STEVE YARBROUGH, ET AL.,
Defendants.

[-1-]

OPINION & ORDER

Plaintiff, Charles Evans, filed this suit against Lora H. Cleary, Eugene F. Battisti, Jr., Judge Steve Yarbrough, Judge Susan Brown, Magistrate Anne Tsitouris, and Joseph Pilat, alleging violation of his constitutional rights. The Plaintiff's suit stems from a domestic relations case in which the Plaintiff has been involved for approximately three years.

This matter is before the Court on Defendants' Motion to Dismiss.[1]

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[1] Defendants Lora H. Cleary and Eugene F. Battisti, Jr. filed their Motion to Dismiss And/Or Motion for Summary Judgment separately from Defendants Judge Steve Yarbrough, Judge Susan Brown, Magistrate Anne Tsitouris, and Joseph Pilat's Motion to Dismiss. These Motions will be considered together.

I. FACTS

The Plaintiff filed for divorce in Franklin County Court of Common Pleas in April of 1996, against his third wife, Christina Klaeger Evans. The Plaintiff and his wife had one minor child from their marriage, Hannah Evans, born on June 12, 1994. Hannah is the Plaintiff's only child.

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Defendant Tsitouris was assigned as the Magistrate in the case. On June 19, 1996, the Domestic Relations Court issued temporary orders addressing allocation of parental rights and responsibilities and child support. Defendant Tsitouris designated Defendant Klaeger as the temporary residential parent of Hannah, and the Plaintiff was granted visitation. The Plaintiff was ordered to pay child support in the amount of $740.63 per month and to maintain current levels of medical and hospitalization insurance for Hannah. By Defendant Tsitouris' order dated April 9, 1997, Defendant Cleary was appointed as Hannah's guardian ad litem.

Following the temporary orders issued on June 19, 1996, relations between the Plaintiff and Defendant Klaeger became hostile. The Plaintiff filed a motion for shared parenting, a motion to modify the temporary orders, and a motion for sanctions. Defendant Klaeger filed a motion for contempt for non-payment of child support.

These issues came before the Domestic Relations Court on October 20, 1997, when Defendant Klaeger and Plaintiff agreed to shared parenting for Hannah. After the agreement, there was an escalation of hostility between the parties. These hostilities came to the attention of Defendant Cleary who heard the Plaintiff threaten to take Hannah away from her mother.

Defendant Cleary filed a motion to set-aside the original agreement.

Defendant Judge Susan Brown signed an ex-parte order setting aside the October 30, 1997 agreement. In response, the Plaintiff filed several additional motions. The motions were heard during a twenty day trial before Defendant Tsitouris. At trial, the Plaintiff proceeded pro se and Defendant Klaeger was represented by Defendant Battisti. Defendant Cleary was present throughout the trial as guardian ad litem of Hannah.

Defendant Tsitouris filed her decision on June 15, 1998. Defendant Tsitouris denied the Plaintiff's motion for shared parenting, designated Defendant Klaeger as the residential parent

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and legal custodian of Hannah, granted Plaintiff visitation, and ordered the Plaintiff to pay child support in the amount of $759.40 per month. Defendant Tsitouris also found that the Plaintiff was arrears in his child support payments in the amount of $11,916.42.[2] Following this decision, the Plaintiff re-hired his attorney.

On August 26, 1998, Defendant Yarbrough held a hearing to address issues relating to the divorce, the division of assets, and to address other motions pending in the case.[3] During these proceedings, Defendant Yarbrough held the Plaintiff in contempt for violating a restraining order and ordered him to pay attorney fees in the amount of $2,500. There was also an award of

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[2] The Plaintiff alleges that Defendant Pilat harmed him by attaching his income taxes and garnishing his wages for back payment of child support.

[3] Subsequent to the proceedings over which Defendant Tsitouris presided, all of the Franklin County Domestic Relations Judges recused themselves from hearing the case. The Supreme Court of Ohio appointed Judge Yarbrough to sit by assignment and to preside over the remaining issues in the divorce litigation.

attorney fees to the guardian ad litem of $12,056.25 from plaintiff and $11,906.25 from Defendant Klaeger.

On December 23, 1998, Plaintiff's counsel filed amended objections. Defendant Yarbrough requested a financial expert be appointed to review the Plaintiff's finances before a hearing that was scheduled for June 3, 1999. The Plaintiff was ordered to pay for the expert but refused to remit payment until June 1999.

On June 1, 1999, the Plaintiff filed in this Court a Motion for a Temporary Restraining Order and, in the alternative, a Motion for Preliminary Injunction, alleging that his liberty right to custody and equal companionship of his daughter had been denied and that Ohio R. Civ. P. 53(E)(4)(c) and Ohio Rev. Code 3109.04 were unconstitutional. A hearing was held on that

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motion on July 16, 1999. At the hearing, this Court dismissed the Plaintiff's case based on lack of jurisdiction under the abstention doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971). On November 2, 1999, under the same case number, the Plaintiff filed in this Court a second Motion for a Temporary Restraining Order and, in the alternative, a Motion for Preliminary Injunction. Pursuant to Local Rule 65.1, that Motion was heard and denied on November 5, 1999. This Court found that a temporary restraining order should not issue and, again, dismissed the case based on the *Younger* abstention doctrine.

The Plaintiff has filed several civil actions all related to the divorce proceedings.[4] Each of the actions is

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[4] Three separate cases have been filed in various Ohio state courts concerning these issues. One case was before the Franklin County Court of Common Pleas. *Charles R. Evans, et al., v. Philip M. Collins, et al.*, Case No. 97CVH-10-9624. The second case is before the Franklin County Court of Appeals. *Charles Evans v. Christina Klaeger Evans*, Case No. 99APD-

based on his right to an "equal" division of time with his daughter, Hannah, and to the deprivation of his "property" with regard to payment of child support and guardian ad litem fees. The Plaintiff believes that being designated the non-custodial parent has violated his constitutional right to privacy and liberty. The Plaintiff also seeks to hold Ohio Rev. code 3109.04 and Ohio R. Civ. P. 75(M) unconstitutional, and seeks damages under 42 U.S.C. 1983.

This case is before the Court on the Defendants' Motion to Dismiss. At issue is whether this Court should reach the merits of the Plaintiff's claim or follow the *Younger* abstention doctrine and dismiss the Plaintiff's claim.

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II. LAW and ARGUMENT

In considering a Rule 12(B)(6) motion to dismiss, this Court is limited to evaluating whether a plaintiff's complaint sets forth allegations sufficient enough to make out the elements of a cause of action. *See Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). A complaint should not be dismissed under Rule 12(b)(6)"unless it appears beyond doubt that the [p]laintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716,724 (6th Cir. 1996)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). This Court must "construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Conley*, 355 U.S. at 45-46. While the complaint need not specify every detail of a plaintiff's

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03-0297. And finally, the Plaintiff has raised the same constitutional claims in the divorce action filed in Franklin County Court of Domestic Relations, Case No. 96DR-04-1865.

claim, it must give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994). Although liberal, this standard of review does require more than the bare assertion of legal conclusions. See *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993). A complaint must contain either direct or inferential allegations with respect to all the material elements necessary to sustain a recovery under some viable legal theory. *See id.*

A. Jurisdiction

One of the oldest restrictions on the ability of federal courts to interfere with state courts is the Anti-Jurisdiction Act, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. 2283. However, in *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court established 1983 as an exception to the Act. The Court held that 1983 falls within the 'expressly

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authorized" language of the anti-injunction statute and stands as express congressional authorization for federal courts to grant injunction to stay proceedings in state court. *Id.* at 242-43. The holding in *Mitchum* was based on the Court's finding that a "[t]he very purpose of 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action brought under color of state law..." *Id.* at 242. In this case, Plaintiff's claim was brought under 42 U.S.C. 1983 and falls squarely within *Mitchum*'s exception.

B. The *Younger* Doctrine

The Defendants argue that this Court must abstain

from asserting jurisdiction in this case under the doctrine established by *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, the Supreme Court held that absent unusual circumstances, a federal court cannot interfere with a pending state criminal prosecution. *Id.* at 54. In later decisions, the Supreme Court extended the *Younger* abstention doctrine to civil cases. See, e.g. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Ohio Civil rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982); *Huffman v. Pursue, Lt.*, 420 U.S. 592 (1975).

In *Middlesex*, the Supreme Court outlined the test for determining whether the Younger abstention doctrine applies in noncriminal cases. *Middlesex*, 457 U.S. at 432. Under the *Middlesex* test, the Court must consider: (1) whether state proceedings are pending; (2) whether those proceedings involve important state interests; and (3) whether the plaintiff will be afforded an adequate opportunity to raise his constitutional claims in state proceedings. *Id.*

In this case, all of the elements of the *Middlesex* test for *Younger* abstention are satisfied. The first element is satisfied because the state court proceedings are pending, and were pending

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when Plaintiff filed suit in this Court. It is well established in the Sixth Circuit that on-going or pending state proceedings satisfy the first criteria for the *Younger* abstention doctrine. *See Federal Express Corp. v. Tennessee Pub. Ser. Comm'n*, 925 F.2d 962, 969 (6th Cir.)(finding that the first prong of the test was met as a petition for review was pending before the state court of appeals), *cert. denied*, 502 U.S. 812 (1991).

Secondly, as *Middlesex* requires, the Plaintiff's pending divorce case involves important state interests.

Because of the compelling interest the state has in regulating family rights, the state is left to pass legislation governing family law matters such as custody, divorce and parental rights. Disputes in these matters are resolved in specially designated state courts. The fact that a specially designated judicial system exists to resolve family law issues, *ipso facto*, establishes that important state interests are implicated.

The final element of the *Middlesex* test is also satisfied. Ohio state courts have provided, and continue to provide, an adequate opportunity for the Plaintiff to present his constitutional questions. Indeed, the Plaintiff has already brought his constitutional claims to Ohio state courts. *See supra* note 4. Judge Yarbrough, who is currently presiding over the Plaintiff's divorce action, is presently considering essentially the same constitutional claims in the state forum. It would not only be improper under *Younger* and under principles of *res judicata* for this Court to re-litigate the constitutional issues, but it would be a waste of judicial resources to indulge such redundancy.

Under essentially the same fact pattern, the Sixth Circuit upheld dismissal on abstention grounds. In *Kelm v. Hyatt*, 44 F.3d 415 (6th Cir. 1995), a husband filed a class action suit challenging the constitutionality of an Ohio statute that enabling victim of domestic violence to

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receive an ex parte civil protection order. The plaintiff also challenged an Ohio rule allowing parties in a divorce proceeding to obtain a restraining order without a hearing. The Plaintiff sought injunctive relief under 42 U.S.C. 1983, alleging that service and execution of the civil protection order denied him due process. The sixth Circuit affirmed the district court's finding that the pending divorce implicated important state interests and that Ohio courts provided an adequate opportunity for the

plaintiff to present his constitutional challenges. *Id.* at 419-21. For the same reasons, the result in *Kelm* obtains here.

III. CONCLUSION

The facts of the case requires this Court to decline jurisdiction under the *Younger* abstention doctrine. The Defendants' Motions to Dismiss are hereby **GRANTED.**

IT IS SO ORDERED.

/s/ ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

Dated: November 24, 1999